In order to clearly demonstrate the lack of any substantial federal question which appellant is so laboriously trying to obscure, a rather lengthy discussion of the facts as they appear in the record is necessary. For that purpose the argument in support of this motion to dismiss will be divided into four sections. Part I will consider the events which resulted in the inception of the disciplinary proceeding and the filing of the supplemental petition which contains the only charges which have been sustained and are before this Court. Part II will consider the misconduct upon which appellant's disbarment is predicated. Part III will deal with the transcript of two proceedings in the Magistrates Court of the City of New York (Pet. Exs. 11 and 12) upon which appellant predicates much of his argument. Finally, Part IV will consider the "bank statements" (Pet. Exs. 15, 16 and 17) which appellant contends were improperly admitted in evidence.

ARGUMENT

I.

The investigation of appellant's conduct and the filing of charges against him were properly conducted, appellant at all times being afforded a full opportunity to explain and defend his conduct, and no substantial federal question is presented thereby.

The essential facts to be discussed in this portion of appellee's brief are set forth, except where otherwise indicated, in a notice of motion, and supporting affidavit, dated October 3, 1964, requesting the permission of the Appellate Division, First Department, to amend the original petition; an affidavit by Michael Franck, Esq., of counsel for appellee, dated October 20, 1961, with respect to the same

motion; and in appellant's reply and cross motion to dismiss the proceeding and papers submitted therewith.

In the latter part of 1960, appellee's Committee on Grievances obtained from the clerks of the courts concerned certificates of conviction indicating that appellant had been convicted of a number of violations of the Multiple Dwelling Law and other statutes. On December 22, 1960, a letter was written to him requesting that he appear in the office of the Committee on Grievances on January 4, 1961, to discuss the matter. On December 27, 1960, appellant telephoned and stated that he could not appear on the date scheduled, due to the fact that he would be actively engaged in a trial. When advised of the nature of the matter to be discussed with him, he represented that all of his convictions for misdemeanors had been reversed. He was requested to forward by letter the citations of the decisions reversing his convictions and he agreed to do so.

On January 13, 1961, not having heard from him, a further letter was written to appellant requesting the citations which he had agreed to forward in the telephone conversation on December 27, 1960. No reply to this letter was received (papers later submitted by appellant in the course of the disciplinary proceeding admit that no reply was ever made). It therefore appeared that appellant was unable to substantiate his representations that his convictions had been reversed on appeal and, consequently, that they were untrue, particularly since certificates of his convictions were still being issued by the clerks of the courts (the evidence later adduced before the Referee indicates that many of the convictions against appellant were only on appeal at the time of these events and were, in fact, not reversed until after the hearings had been commenced).

Under the circumstances as they then existed, the investigation by appellee's Committee on Grievances indicating that appellant had been convicted numerous times, appellee's Executive Committee, following usual procedure in conviction cases, determined that the public interest required prompt action and authorized prosecution of a disciplinary proceeding against appellant without a formal hearing before the Committee on Grievances.

It should be noted that New York law does not require a hearing in advance of filing formal charges in the Appellate Division. The preliminary inquiry may take any number of forms, "Voluntary affidavits or even unsworn statements will often be enough . . ." *People Ex Rel. Karlin* v. *Culkin,* 248 N. Y. 465, 478. That is because the accused attorney must be given a full opportunity to defend himself before final action can be taken against him by the Court, Section 90 (6) of the Judiciary Law of the State of New York. In the instant case, the preliminary inquiry consisted of obtaining certificates of conviction, communication with appellant and his default in furnishing requested information which he had agreed to submit.

A petition alleging the convictions above referred to, returnable June 20, 1961, was served upon appellant on June 6, 1961. On June 19, 1961, appellant served his answer to the petition alleging, in substance, that most of the allegations in the petition were in error. On July 11, 1961, an order was entered appointing the Referee.

Upon receipt of appellant's answer to the petition, appellee inquired into the specific errors in the petition alleged therein. It was discovered that, in some respects, the certificates of conviction, supplied by the clerks of the courts, and upon which appellee had relied, were in error. In six (6) of the cases referred to in the petition, a corpora-

tion, Unity Estates, Inc., had been substituted by appellant as the defendant in his place. In furnishing certificates of conviction with respect to those cases, the clerks of the courts had obviously overlooked the substitutions and had certified the conviction of appellant, the previous defendant.

Appellee conducted an investigation of the circumstances surrounding the substitution of the corporation in appellant's place as defendant. It obtained information which indicated that the corporation was acting through appellant at the time of the violations for which it was convicted and, indeed, on the dates of the convictions themselves. Consequently, appellee moved to amend the petition previously served to correct the errors therein, particularly to set forth the convictions of the corporation and to allege that with respect to those appellant was still to be held responsible in view of the fact that the corporate acts which resulted in the conviction were directed by him. At the same time, inasmuch as some of the convictions were then on appeal, appellee requested that the hearings be adjourned until those appeals were finally determined.

Appellant cross-moved to dismiss the proceeding and, in any event, opposed a delay in the holding of hearings. The Appellate Division granted the motion to amend the petition and, in view of appellant's objections to any delay, ordered that hearings either be commenced immediately or the petition withdrawn. Pursuant to that order, appellee served an amended petition and proceeded to hold hearings thereon.

The petition, as amended, contained three charges. The first two set forth the convictions which, according to court records, were then outstanding against appellant. During the course of the hearings, many of the convictions were reversed on appeal. Two of them were nullified by writs

of habeas corpus obtained by appellant but not reflected in the court file. Consequently, only one of the convictions alleged in the first two charges was still outstanding at the time the Referee rendered his report. In view of that fact, he concluded that one single conviction was insufficient to constitute a basis for finding that appellant had been guilty of conduct tending to bring the profession into disrepute and he accordingly found the first two charges not sustained (Ref. Report, pp. 6-7).

The third charge of the petition, as amended, sets forth the convictions of the corporation and alleged that appellant was a stockholder, officer and employee and/or agent of the corporation and controlled and/or directed the actions upon which the convictions were predicated. Appellant's answer to that charge was a general denial.

In order to demonstrate appellant's connection with the corporation and the corporation's connection with the premises at which the violations were placed, appellee offered in evidence certified transcripts of the proceedings which took place when the corporation was substituted as defendant instead of appellant with respect to two of the convictions alleged in the third charge (M. pp. 93-8). The propriety of the admission in evidence of those transcripts (Pet. Exs. 11 and 12), and their significance, will be fully discussed at a later point in this brief, see III *infra*.

After appellee's case had been presented, appellant testified in his own defense. He testified that he was neither an officer, director or stockholder of the corporation which he substituted for himself as defendant (M. p. 183); that with respect to four of the convictions alleged [including the two with respect to which the minutes of the proceedings at the time of the substitution (Pet. Exs. 11 and 12)

had been offered in evidence], the corporation was not the actual owner of the premises involved which were then actually owned by appellant's sister (M. pp. 184-5); that at the time he substituted the corporation as defendant instead of himself, the corporation had nothing whatever to do with the premises (M. p. 194); and that he had intentionally substituted a corporation which was inactive (M. pp. 198-9). On cross-examination, appellant added that prior to these convictions, an effort had been made to withdraw the building involved from the rental market because they were operating at a loss (M. pp. 202-3).

In an effort to impeach that testimony by appellant which tended to absolve him of any connection with the premises at which the violations were placed and with the corporation which had been substituted in his place as defendant, appellee offered in evidence three financial statements (Pet. Exs. 15, 16 and 17) in appellant's own handwriting which he had submitted to a bank at various times during the period concerned (M. pp. 203-8). The propriety of the admission in evidence of these statements, and their significance, will be fully discussed at a later point in this brief, see IV *infra*.

This background demonstrates that the proceedings herein were instituted in reliance upon certificates of conviction furnished by the clerks of the various courts involved; that appellant was afforded an opportunity to set forth his explanation of these convictions against him; that he agreed to substantiate his claims; and that it was only after he had failed to do so that a disciplinary proceeding was instituted against him in which, as the record amply demonstrates, he was afforded a full opportunity to defend himself and to present such evidence as he deemed relevant.

II.

The charges of which appellant was found guilty, together with his conduct during the course of the hearings, amply warrant the discipline imposed and no substantial federal question is raised thereby.

We believe that this point is adequately substantiated by merely setting forth, without comment, the conduct for which appellant was disbarred.

Appellant was found guilty of making false representations to courts on two occasions. Specifically, it was found that in two cases in the Magistrates Court of the City of New York in which he personally was the defendant (one of which involved a misdemeanor), appellant had a corporation substituted in his place as defendant by falsely representing to the court that it was the owner of the premises at which the violations upon which the prosecution was predicated had been placed.

Appellant was also found guilty (Charge VI of the Supplemental Petition) of submitting to a bank, in connection with loan applications, three separate financial statements on behalf of corporations of which he represented himself to be the president falsely setting forth their financial condition, ownership, operations and/or control.

Finally, in determining the discipline to be imposed, the Court below considered "the attitude, conduct and testimony" of appellant in this proceeding (Opinion below, reprinted as part of appellant's Jurisdictional. Statement, pp. 35-6). Some of the occurrences in the course of the hearings below which reflect upon appellant's attitude, conduct and testimony are here set forth:

(1) Appellant testified that an officer of the bank to which he had submitted the financial statements on which the charge against him was predicated had advised him that he recalled that when the statements were submitted appellant had advised the bank not to rely on the information contained therein. When asked who this bank officer was, appellant stated that he had forgotten the name and would have to find out (M. p. 649). No bank officer was ever produced by appellant nor was this extremely-relevant point, if true, ever mentioned again.

(2) Appellant contended that the substitution by him of a corporation in his place and stead as defendant which had nothing to do with the premises had been specifically agreed upon with an Assistant Corporation Counsel. He identified this individual as Silas Lippman, Esq. Mr. Lippman, who had retired, was located by appellee and called as a witness. Instead of attempting to substantiate his claim, appellant cross-examined Mr. Lippman in an effort to show that he was not the Assistant Corporation Counsel who handled the cases in question (M. pp. 237-9). He thereupon concluded his cross-examination. When the Referee then asked counsel for appellee why Mr. Lippman had been produced if there was no showing that he was the Assistant Corporation Counsel who handled the particular cases involved, counsel pointed out that Mr. Lippman had been specifically identified by appellant as the Assistant Corporation Counsel with whom the agreement was made. Immediately after that statement was made, appellant resumed his cross-examination of Mr. Lippman and unsuccessfully tried to substantiate his claim that such an agreement had been made (M. pp. 240 ff.).

(3) Appellant testified in the course of the hearings that his numerous convictions had been the result of a con-

spiracy against him by various New York City officials; that the Magistrates had been told to convict him; and that they had admitted this to him (M. pp. 403-4).

On cross-examination, appellant was asked to identify the magistrates who made such admissions. Although he himself had offered this testimony, he first objected to the question as being immaterial. When that was overruled, he objected on the ground that the conversations between himself and the Magistrates were privileged communications (M. pp. 408-9). When that objection was also overruled, appellant simply refused to answer (M. p. 409).

In this connection, it should be noted that far from preventing appellant from showing that he was the victim of some alleged conspiracy as he claims, both appellee and the Referee went to extraordinary lengths to make certain that appellant received every opportunity. Thus, at the hearing on December 20, 1963, when it was anticipated that the matter would be completed and appellant had not yet furnished proof which he had represented at prior sessions he would obtain, both counsel for appellee and the Referee called appellant's attention to every such offer which he had up to then not yet substantiated (M. pp. 389-403). Similarly, at a later point (M. pp. 672-693) the Referee reviewed appellant's offer of proof (Resp. Ex. A) and specified that his refusal to accept the proof offered would be withdrawn if there was a showing that his allegations were part of a "conspiracy with the present proceeding" (M. p. 678). No such showing was, of course, ever made or even attempted.

III.

No substantial federal question is presented by the admission in evidence of the minutes of the proceeding in the Criminal Court wherein appellant substituted a corporation in his place as defendant inasmuch as no proper objection to their admission was made and, in any event, appellant later sought to introduce one of them in evidence himself.

The colloquy which took place when these minutes (Pet. Exs. 11 and 12) were offered in evidence (M. pp. 93-97) clearly demonstrates that the sole basis for appellant's objection thereto was his claim that they were incomplete, that is they did not reflect all that took place. Appellant so understood his own objection at the time it was made. Thus, when the second transcript (Pet. Ex. 12) was offered, he stated (M. p. 97):

> "I object to this on the same grounds, except that here we substituted the corporation first. The ground for my objection is that there were proceedings before which are not covered by these minutes. In other words, we had a trial here."

The claim that the minutes offered were incomplete rather than inaccurate might affect the weight to be given them but did not make them inadmissible and the objection was properly overruled. It might be noted parenthetically that the reason that the stenographer was not ultimately produced was because it was learned that he had retired and moved to California. Moreover, appellant, who later testified about the circumstances surrounding the substitution of the corporation in his place, never contended that

the Court which was asked to approve the substitution was ever apprised of the fact that the corporation had no connection with the premises at which the violations had been placed.

To the contrary, appellant clearly testified that he had arranged to substitute the corporation in his place as defendant, although it admittedly had nothing to do with the premises involved, with an Assistant Corporation Counsel and representative of the Buildings Department (all of whom he named and all of whom subsequently testified and denied appellant's assertions in this regard). Appellant stated that this agreement with these named individuals had been reached some months before the substitution was actually made (M. pp. 196, 198). He explained that he desired to substitute a corporation because he did not trust the Magistrates (M. pp. 372-3), thereby demonstrating not only that the Magistrates were never apprised of the true facts but that he intentionally misled them.

The record demonstrates, moreover, that appellant actually vouched for the accuracy of the minutes in the use he made of them during the hearing. Thus, as the Referee notes (Ref. Report, pp. 9-10), appellant sought to use one of the transcripts (Pet. Ex. 12) to substantiate a contention he was advancing.

Finally, far from disputing the accuracy of these transcripts at any point in the hearings, appellant himself offered one of them (Pet. Ex. 12) in evidence (M. p. 291).

IV.

No substantial federal question is raised by the admission in evidence of the "bank statements" inasmuch as the originals were submitted for appellant's inspection and, in any event, it is conceded that they are entirely in his own handwriting.

Charge VI of the supplemental petition is predicated upon the financial statements (Pet. Exs. 15, 16 and 17) used in cross-examining appellant in connection with testimony offered by him in defense of the charges contained in the amended petition under the circumstances set forth *supra*, Point I. These documents contradict appellant's sworn testimony in many respects. Thus, when they were first shown to him and admitted in evidence, appellant stated, with respect to the representations in his own handwriting contained therein, that "this wasn't quite correct" (M. p. 204); "it was not correct" (M. p. 204); "This is just a statement. This was a statement. None of these facts were correct. A search of the records would have shown that none of those facts were so" (M. p. 209); that insofar as his testimony differs from the "bank statements," the documents were incorrect (M. pp. 209-10, as corrected as M. pp. 219-24). These admissions that the "bank statements" were untrue were suspect at the time inasmuch as the documents contained information in appellant's own handwriting which supported the allegations of the then-pending charges. Nevertheless, an investigation was commenced and it was ascertained that the documents were, in fact, false. Charge VI was predicated upon that falsity.

Once the new charges were served upon him, appellant changed his testimony and claimed that the "bank state-

ments" were true. Thus, for example, the "statements" (Pet. Exs. 15, 16 and 17) cover the years 1952-1955. Throughout that period, according to the information contained in them, each of the buildings involved had thousands of dollars of annual income. When this claim of annual income was first called to his attention, appellant admitted that the buildings were in fact operating at a loss and that the "statements" to the contrary were incorrect (M. p. 210). Despite that admission appellant, after service upon him of the supplemental petition, contended that the "statements" were in all respects accurate, including the representations as to income. Yet, in direct contradiction to his latest claim, appellant had represented to the Court of Appeals of the State of New York (in a brief submitted by him in connection with a case decided November 23, 1955, and argued on October 14, 1955, *Emray Realty Corp.* v. *Abrams,* 309 N. Y. 888) that with respect to one of the buildings referred to in the "bank statements" (1) about two years ago [1953] the landlord had sought to withdraw the building from the rental market because it was losing money (M. p. 544); (2) even at the registered rents the building was losing money (M. p. 501); (3) the building will lose this year [1955] $9,278.66 (M. pp. 501-2); and (4) in two years the building has lost more than $25,000 (M. p. 502). When these representations to the Court of Appeals, which contradicted his then claim that the "bank statements" were accurate, were offered into the record, appellant objected as follows:

> "I object to any of this as merely argument before a Court of Appeals or anyplace, and not legal proof" (M. p. 502).

It is precisely because the proof in the record so thoroughly established the falsity of the documents submitted by appellant to the bank that he sought to have them excluded on the ground that they had somehow been "smuggled" into evidence by appellee. Thus, it is impossible to reconcile the claim by appellant that appellee resorted to subterfuge to put the "bank statements" in evidence with his admission that they are entirely in his handwriting and with his claim that they are in all respects accurate. Nevertheless, that is appellant's contention.

In substance, appellant contends that the manner in which these exhibits (Pet. Exs. 15, 16 and 17) were put together and the fact that they were photostats substantiates his claim of impropriety. As indicated in the affidavit submitted in opposition to appellant's motion to the Referee to strike these exhibits, the middle sheet of each, which is the "disputed" sheet, was placed there because that is where it was kept in the originals which are part of the bank's files. In any event, appellee, far from attempting to conceal anything as alleged by appellant, produced the bank officer at the hearing before the Referee on November 19, 1963, together with his file which contained the originals of the exhibits. As the record discloses, appellant asked for and was given at least one of these originals which he examined (M. p. 344). The record further discloses that at the same hearing the bank officer testified, in response to appellant's question, that the "disputed" page of each exhibit supplemented the remaining pages (M. p. 340); is required by the bank (M. p. 341); and is usually submitted at the same time (M. p. 344). Thus, at that hearing, appellant had available all the information on the basis of which he subsequently challenged the accuracy and validity of these exhibits. Nevertheless,

he did not raise the point until after the hearing held March 20, 1964, although in the intervening period hearings were held on December 20, 1963, and January 10, 1964 (and the hearings were closed), more than one month after he had been served with appellee's brief to the Referee in which the full significance of these exhibits was set forth. Appellant had clearly reached the point where he would make whatever claim came to mind, regardless of the evidence in the record.

In his desperate efforts to extricate himself, appellant contended that even though the "bank statements" were in his own handwriting and had been furnished by him to the bank, they could not be used by the bank in any action against him inasmuch as they were not signed and therefore unenforceable under the Statute of Frauds, the Parol Evidence Rule, etc. For the same reason, appellant argued the Court below could not consider them in the context of the disciplinary proceedings against him. These technical defenses were properly rejected by the Court below in these words (Opinion below, reprinted as appendix to appellant's Jurisdictional Statement, p. 36):

> "The Lawyer's duty of candor and fairness is not suspended for the purpose of making a defense to a disciplinary proceeding. 'Where a member of the Bar is charged with delinquencies, as in this case, there is but one course open to him—to come forward frankly and make such truthful explanations as he may, and with equal frankness admit his mistakes. It does not profit him before this court to rely upon technical defenses or employ sophistry in argument in attempts to establish a superficial justification' (*Matter of Feinstein*, 233 App. Div. 541, 542-3)."

CONCLUSION

We respectfully submit, therefore, that the appeal should be dismissed because no substantial federal question has been presented.

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November 10, 1965.